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December 2, 2013

Paul Massera
California Water Plan Update 2013
California Department of Water Resources
P.O. Box 942836, Sacramento, CA 94236-0001

VIA ELECTRONIC MAIL: cwpcom@water.ca.gov

Re: Comments on California Water Plan Update 2013, Volume 3: 30 Resource Management Strategies

Dear Mr. Massera:

Earth Law Center (ELC), a California 501(c)(3) environmental organization, welcomes the opportunity to submit these comments on California Water Plan Update 2013, Volume 3 (Plan). These comments add to our earlier submitted comments with regard to Volume 1, which are incorporated by reference. We also attach and incorporate our comments on the Administration's proposed Water Action Plan;[1] a number of these comments have direct relevance to Volume 3.

In brief, the most notable gap in the list of recommendations in Volume 3 is a clear call for the changes in law needed to advance sustainable water use into the 21st century. Volume 3 contains a number of helpful recommendations with regard to educational, technical and scientific advancements that need to be made to achieve this goal. But on law, the document is largely quiet. Regardless of the strength and innovation of our other recommendations, we will not succeed if the law continues to facilitate (and in many cases, push) unsustainable water use patterns.

Accordingly, we first reiterate our requests in our comments in Volume 1; specifically, we urge DWR to develop and implement expeditiously:

- the particular steps that will be taken to "apply[] existing water rights laws and the twin principles of reasonable use and public trust" to ensure water for current and future generations; and
- the legal and programmatic structures needed to recognize the inherent rights of waterways to flow, and for waterway-dependent fish and wildlife to thrive.

In addition, we urge DWR to also include the following additional commitments in its Volume 3 Recommendations:

[1] Available at: http://resources.ca.gov/docs/Final_Water_Action_Plan.pdf.

- specific strategies for ensuring that the environment is a beneficiary of water conservation measures;
- a serious discussion of the contours, benefits and costs associated with aggressive reduction of Delta exports;
- the institution of a mandatory groundwater withdrawal permit system that establishes short- and long-term aquifer health as the basis of the system; and
- the development of a specific process to halt and prevent the "waste and unreasonable use" of groundwater.

These requests are discussed further below and in the attached Water Action Plan comments.

Chapter 2, Agricultural Water Use Efficiency

Page 2-10 of Chapter 2 provides one of the few (if not only) clear references to applicability of the waste and unreasonable use doctrine in Volume 3, noting that:

> The State Water Resources Control Board and the Delta Stewardship Council published a report in 2011[2] that examines the "reasonable use doctrine" … as it relates to agricultural water use efficiency…. The report concludes that the Reasonable Use Doctrine may be employed to promote a wider use of such efficient practices [and] recommends that the State Water Resources Control Board convene a Reasonable Water Use Summit and contain specific recommendations for consideration during the summit.

Unfortunately, the chapter Recommendations (pp. 2-22 to 2-24) fail to take up this call, and include no recommended actions related to implementing the waste and unreasonable use doctrine.

As discussed in our attached Water Action Plan comments, the California Constitution prohibits the "waste or unreasonable use or unreasonable method of use of water"[3] to protect the many beneficial uses of water in the state, including but not limited to the preservation and enhancement of fish populations.[4] Despite this clear, broad mandate, the state has relatively rarely exercised this authority. Addressing even the most egregious cases of misuse is costly and time-consuming under the existing regulatory system, which essentially requires one-by-one examination of allegations of water waste.[5] The Delta Watermaster's 2011 call for a summit on this topic was shut down quickly, and little public action has occurred since then to create a streamlined effort to ferret out waste and unreasonable use statewide. Accordingly, we urge DWR to include in its Recommendations a commitment to the development and implementation of a streamlined process for implementing the Constitution and Water Code's "waste and unreasonable use" provisions for both surface water and groundwater.

[2] Craig Wilson, Delta Watermaster, "The Reasonable Use Doctrine and Agricultural Water Use Efficiency" (Jan. 2011), available at: http://www.swrcb.ca.gov/board_info/agendas/2011/jan/011911_12_reasonableusedoctrine_v010611.pdf .
[3] California Constitution § Article X Section 2; *see also* Water Code § 275.
[4] Water Code § 1257.
[5] 23 CCR §§ 780, 855 *et seq*., and 4000 *et seq*.

We also note that the Chapter 2 Recommendations fail to include any discussion of the actions needed to ensure that conserved water is either put back in to the environment, or that it stays in the environment rather than be slated for withdrawal later (rendering the efficiency measures moot from a waterway perspective). Instead, the Recommendations focus on human water claims, stating on page 2-22 for example that the "State should clarify policy and improve incentives, assurances, and water rights protections to allay fears over the loss of water rights resulting from improved water use efficiency." As described further in our attached Water Action Plan comments, this is an unfortunate example of the limitations of the "co-equal goals" approach, which allocates greater importance to human water desires over environmental water needs. Until we recognize our utter dependence on the environment's water and protect it as essential to our own (actual) needs, we will fail to achieve and maintain sustainable patterns of water use. We urge DWR to include in the Recommendations specific strategies for ensuring that the environment is a beneficiary of conservation measures, which must be undertaken regardless of public "fears" over water losses that will most certainly occur under our current trajectory.

Chapter 3, Urban Water Use Efficiency

Again, this chapter discusses the importance of efficiency but stops short of making recommendations for implementation of the waste and unreasonable use doctrine. For example, pages 3-18 to 3-19 state that:

> Water conservation and water use efficiency are considered primary climate change adaptation strategies—those that should be undertaken first because they are generally lower-cost and provide multiple benefits. By implementing practices that make the most of available water supplies, practices that reduce waste and increase efficiency, the urban water use sector will be better equipped to adapt to potential reductions in water supply.

However, the Recommendations (pages 3-21 to 3-22) contain no language on waste and unreasonable use, nor on the process for keeping conserved water in the environment. As with agricultural water use efficiency, the state needs clear, consistent messaging on efficiency that is reflected in the law, which the Water Plan currently fails to accomplish.

Chapter 5, Conveyance - Delta

The Bay Delta Conservation Plan (BDCP) arose from the threatened extinction of key Delta species, and fundamentally serves as a proposed Habitat Conservation Plan under federal endangered species law and Natural Community Conservation Plan under state endangered species law. That is, the BDCP is intended to "provide for the recovery of endangered and sensitive species and their habitats in the Delta in a way that will also protect and restore water supply reliability."[6] However, rather than endangered species recovery, the focus of the BDCP has been the development of new conveyance systems, pumping stations and other infrastructure to serve human water desires, providing little in the way of specifics as to how potentially moving more water away from a depleted system will help restore the system or the plummeting species populations that triggered the BDCP process to start.

[6] http://baydeltaconservationplan.com.

Rather than taking action to restore the Delta, moreover, the proposed commitment to the BDCP water conveyance system exacerbates environmental damage further by positioning the conveyance system as necessary to construct even more environmentally destructive infrastructure. Specifically, as noted in our attached comments, the Water Action Plan notes that financial partners potentially interested in funding large surface storage facilities have been holding back in part due to the "uncertainty involved in moving water across the Delta," uncertainty that would be resolved in part by the "new conveyance system proposed in the Bay Delta Conservation Plan."

Despite these mounting concerns, none of the Recommendations in this chapter recognize the findings of the 2008 PPIC Report[7] on this topic that a water conveyance system may actually be unnecessary to meet human water needs. Specifically, the authors found that implementation of a "no exports alternative" would involve the development by water users of "alternative, higher-cost sources" and a reduction of "agricultural and urban use particularly for agriculture in the southern Central Valley."[8] In other words, if California made the investments outlined in the 2008 PPIC Report, the state could end exports, markedly improve Delta health, and create local water resilience and improve supply certainty through source diversification. We urge DWR to include in the Plan a serious discussion of the contours, benefits and costs associated with aggressive reduction of exports and retention of the saved water in waterways as needed for their well-being.

Chapter 9, Conjunctive Management and Groundwater Storage and Chapter 16, Groundwater/Aquifer Remediation

The Plan appropriately considers the importance of groundwater management in several areas, including Chapters 9 and 16. However, more of a specific focus on controlling groundwater withdrawals needs to be made in light of the escalating overdraft of groundwater basins around the state,[9] a problem that will only accelerate without further controls. However, none of the Recommendations (pages 9-22 to 9-27 and pages 16-8 – 16-9) address the state's continued, marked failure to join the rest of the U.S. states in mandating controls on groundwater use. In this way the chapters are like the Water Action Plan, which postpones meaningful action on groundwater until "a basin is *at risk of permanent damage*" by over-drafting (Water Action Plan page 6, emphasis added). By that point (*i.e.*, the cusp of permanent aquifer damage), though, groundwater pumping and use patterns have already been cemented into place and will be that much harder to change. Action *before* such significant damage has been done to natural systems is necessary to ensure change occurs in a timely manner. This is true as well for groundwater quality, as of course pumping can spread and move contaminant plumes.

Accordingly, we urge DWR to include in Volume 3 Recommendations that commit the state to the institution of a mandatory groundwater withdrawal permit system that establishes

[7] Public Policy Institute of California, "Comparing Futures for the Sacramento–San Joaquin Delta," (July 2008), available at: http://www.ppic.org/main/publication.asp?i=810 ("2008 PPIC Report").
[8] *Id.*, p. 108.
[9] *See, e.g.*, J.N. Sbranti, "Groundwater levels falling at alarming rate while lawmakers decide what to do," *Modesto Bee* (Nov. 9, 2013), available at: http://www.modbee.com/2013/11/09/3021442/groundwater-levels-falling-at.html ("[g]roundwater reserves are shrinking by 800 billion gallons per year in the Central Valley").

short- and long-term aquifer health as the basis of the system. Moreover, we also urge that the Recommendations also include commitment to the development of a streamlined process to halt and prevent the "waste and unreasonable use" of groundwater, as suggested the SWRCB's recently-issued "Groundwater Workplan Concept Paper."[10]

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Thank you for your attention to these comments. If you have any questions, please do not hesitate to contact us.

Best regards,

Linda Sheehan,
Executive Director
lsheehan@earthlaw.org

Attachment

[10] SWRCB, "Groundwater Workplan Concept Paper," pp. 1, 10 (Oct. 4, 2013), available at: http://www.waterboards.ca.gov/water_issues/programs/groundwater/docs/gw_workplan100713.pdf.

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November 15, 2013

John Laird, Secretary
California Natural Resources Agency

Matt Rodriquez, Secretary
California Environmental Protection Agency

Karen Ross, Secretary
California Department of Food and Agriculture

VIA ELECTRONIC MAIL: wateraction@water.ca.gov

Re: Comments on Draft California Water Action Plan

Dear Secretaries Laid, Rodriquez and Ross:

Earth Law Center (ELC), a California 501(c)(3) environmental organization, welcomes the opportunity to submit these comments on the draft California Water Action Plan (Plan). ELC supports a number of the general goals of the Plan, including improving conservation, increasing regional water self-reliance, and protecting and restoring ecosystems. ELC also supports the direction given to agencies to identify areas where user and/or polluter fees may be appropriate (p. 17), the proposed modernization of coastal stream crossings, and the implementation of coastal habitat projects that "restore ecological health and natural system connectivity" (page 9). ELC further supports to full implementation of the human right to water (page 12), and proposed coordinated efforts by the State Water Resources Control Board (SWRCB or Board) and Department of Fish and Wildlife (DFW) to enhance flows in critical habitats for anadromous fish (page 10).

These positive steps and intentions, however, will fail to be realized without a meaningful commitment to strategies that directly challenge the ongoing, destructive status quo of how we use water to fulfill our desires and fail to acknowledge natural systems' needs. The Plan makes no significant headway in this direction, and indeed makes no specific commitments to achieving even its described strategies by a date certain.

The state's growing water concerns demand swifter and surer action. We highlight below some of our key concerns, and ask that they be addressed in the upcoming revisions to the Plan and implemented expeditiously. Specifically, we ask that the revised version of the Plan:

- Include an assessment of the effectiveness of the "co-equal goals" approach as compared with an approach that ensures the well-being of environmental systems;
- Correct the faulty assumption that California can "balance" water needs on the back of the environment, an assumption that is contrary to Clean Water Act requirements;

- Redact language concluding that the proposed Bay Delta Conservation Plan (BDCP) conveyance facilities and projected surface water storage facilities will help "improve the ecological health of the Delta";
- Include language committing to a mandatory groundwater management program;
- Address a wider range of water management alternatives, including the development of locally resilient water strategies facilitated through the aggressive reduction of exports;
- Create a streamlined process to halt and prevent the "waste and unreasonable use" of surface water and groundwater; and
- Develop legal and programmatic structures to recognize the inherent rights of waterways to flow.

THE LIMITATIONS OF THE "CO-EQUAL GOALS" APPROACH

Adherence to the "Co-Equal" Goals Presumption Avoids Sound Decision-making for Long-Term Water Sustainability

We agree completely with the Plan that "the status quo in the Delta is unacceptable" and that action needs to be taken now, before further degradation occurs (page 6). However, we have significant concerns with regard to the ability of the "co-equal goals" approach to achieve the stated intent of a healthy Delta and reliable water supplies. Instead, water supply reliability can only be achieved consistent with an *overarching* goal of environmental sustainability. Expressing our vision through a false dichotomy of "water for environment" and "water for humans" will only pit one against the other, to the detriment of both. If the environment fails, so will the reliability of our water supply.

We cannot extricate ourselves from our environment, no matter how many policies and laws to that effect that we adopt. The "co-equal goals" presumption allows us to continue to imagine that our own needs are not dependent on and integrated with the needs of the ecosystems. Rigid adherence to this faulty presumption only delays our acceptance of the inevitable: that we simply must learn to live within our means, or the environment will ensure that we do, but in a manner for which we did not plan.

An illustration of the flaws inherent in applying a "co-equal goals" baseline can be seen in analysis and conclusions of the 2008 Public Policy Institute of California (PPIC) Delta Report.[11] The 2008 PPIC Report "focus[ed] on a central question for long-term Delta policy: Which water management strategies best meet the goals of environmental sustainability and water supply reliability?"[12] The Report quickly presupposed that "[e]xport policy decisions will drive environmental actions and regulations"[13] and laid out four alternatives[14] for "managing

[11] Public Policy Institute of California, "Comparing Futures for the Sacramento–San Joaquin Delta," (July 2008), available at: http://www.ppic.org/main/publication.asp?i=810 ("2008 PPIC Report").
[12] 2008 PPIC Report, p. iii.
[13] *Id*. at p. vi.
[14] The alternatives were: (1) continue pumping exports through the Delta, (2) divert water upstream and convey it around the Delta through a peripheral canal, (3) combine the current through-Delta pumping strategy with a peripheral canal (so-called "dual conveyance" or "dual facility"), and (4) end exports altogether.

Delta water exports," noting that the alternatives "are examined in terms of the two co-equal objectives for the Delta suggested by the governor's Delta Vision Blue Ribbon Task Force: environmental sustainability and water supply reliability."[15]

The inherent flaws of the analysis are visible at once from its baseline assumptions. The "co-equal goals" framework allowed the analysts to jump almost immediately to the continued bias of presupposing that "[e]xport policy decisions will drive environmental actions and regulations," rather than considering the reverse as well. Even though the Report specifically found that "[a] broad consensus exists among estuarine experts that *ending exports* is likely to be best for a range of desirable fish species,"[16] the bias afforded by the Report's foundational assumptions: (a) facilitated an analysis that minimized the significance of a healthy ecosystem and (b) allowed for an ultimate, "values"-driven (rather than science-driven) conclusion *away* from ending exports.

Specifically, faced with an apparent obligation to choose among its four water management alternatives, the Report first found that *ending exports was a viable alternative*,[17] and then noted that:

> A clear tradeoff exists between a peripheral canal and dual conveyance and the alternative of ending exports. Peripheral canal and dual conveyance costs are lower, whereas ending exports is better for fish. *Selecting between these alternatives will require a value judgment*.[18]

Passing over the consensus estuarine science that ending exports would be best for fish, the authors bowed to their initial bias of "water export decisions driving environmental actions" and drew their final statements from that foundation. They concluded that "[a] peripheral canal is a necessary component of a long-term solution that serves economic and ecosystem objectives *co-equally*"[19] – ignoring the fact that the end result was, in fact, deeply *un*equal from the environment's perspective.

In other words, just as the Water Action Plan attempts in 2013, the 2008 PPIC Report strained to make water exports and environmental health "equal" – and as a result, made water exports "more equal." We ignore our ultimate dependence on a healthy environment at our own peril. Until we accept that fact and commit to designing our water delivery systems consistent with an *overarching* goal of ecological health, we will not be able to plan a sustainable, reliable water future for California. The Plan must embrace this reality and build its strategies from that foundation in order to achieve success.

Adherence to the "Co-Equal" Goals Presumption Places California at Odds with the Federal Clean Water Act

[15] *Id*. at p. vii.
[16] *Id*. at pp. x-xi (emphasis added).
[17] *Id*. at p. 108.
[18] *Id*. at p. 109 (emphasis added).
[19] *Id*. at p. xv.

As another example of the results of effectively marginalizing environmental health, Section 3 of the Water Action Plan includes a brief description of the SWRCB's update of the Bay-Delta Water Quality Control Plan as advancing sustainable water use (page 8). In fact, we question the Plan's description of the current draft of the Bay-Delta Water Quality Control Plan as consistent with working toward a reliable, clean water supply in California. As detailed in ELC's March comments[20] on the draft Bay-Delta Water Quality Control Plan Substitute Environmental Document (Draft SED),[21] the document actually runs contrary to federal Clean Water Act directives on the adoption of new water standards, and cannot be viewed as advancing sustainable water use.

Specifically, the Water Action Plan states that the SWRCB will complete its update of the Bay-Delta Water Quality Control Plan in a way that will "balance competing uses of water" (page 8). However, as detailed in ELC's March comments, this position relies inappropriately on state water law, specifically Porter-Cologne Water Quality Control Act provisions including Sections 13000 and 13241, rather than the more protective federal Clean Water Act (CWA). The former calls only for the highest water quality that is "reasonable" in light of competing uses and other factors. However, the Clean Water Act requires protection of *all* beneficial uses through science-based criteria – including the most sensitive uses, which cannot be "balanced" away.

More particularly, the CWA was established to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[22] To ensure that water quality improves, rather than degrades, the CWA requires state adoption of water quality standards that "shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses."[23] The use of waterways for the "protection and propagation of fish, shellfish, and wildlife" was given special attention through the "fishable/swimmable" provision in CWA 101(a)(2). This provision effectively creates a rebuttable presumption that these uses are attainable unless a state or tribe "affirmatively demonstrates, with appropriate documentation, that such uses are not attainable"[24] (though "existing uses" cannot be eliminated).[25]

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[20] Comment Letter from Earth Law Center to State Water Resources Control Board, "Bay-Delta Plan SED" (March 28, 2013), available at: http://earthlawcenter.org/static/uploads/documents/Bay-Delta_Plan_Comments_1.pdf.

[21] SWRCB, "Draft Substitute Environmental Document in Support of Potential Changes to the Water Quality Control Plan for the San Francisco Bay-Sacramento/San Joaquin Delta Estuary: San Joaquin River Flows and Southern Delta Water Quality" (Dec. 2012), available at: http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/bay_delta_plan/water_quality_control_planning/2012_sed/ ("Draft SED").

[22] CWA § 101(a); *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700, 704 (1994) (*PUD No. 1*). For most of the CWA's implementation history, regulatory attention has been primarily focused on the chemical integrity of waterways, even though the letter of the law demonstrates that it was also written to address other elements of waterway health. Regulatory agencies have significantly increased their attention on biological integrity over the last 5-10 years. Physical integrity is now starting to reach the regulatory docket, particularly since the *PUD No. 1* Supreme Court decision, with more states adopting narrative flow criteria and taking other actions under the CWA to create more flows in waterways.

[23] CWA § 303(c)(2)(A); *PUD No. 1* at 704.

[24] *See, e.g.*, U.S. EPA, "Water Quality Standards Academy, Key Concepts (Module 2.c)," available at: http://water.epa.gov/learn/training/standardsacademy/mod2/page4.cfm.

[25] 40 CFR §§ 131.10(g), (h)(1).

In setting criteria to protect the beneficial uses, U.S. EPA regulations[26] require states to "protect [*not* 'reasonably' protect, as in Porter-Cologne] the designated use." The EPA regulations add that:

> [s]uch criteria must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use. *For waters with multiple use designations, the criteria shall support the most sensitive use*.

(Emphasis added.) The regulations conclude that criteria may be based on U.S. EPA Guidance developed pursuant to CWA Section 304(a) or "[o]ther scientifically defensible methods," including biomonitoring. In other words, the CWA dictates that *criteria must protect the most sensitive beneficial use and must be based on science*. Other considerations (such as cost) do not factor into the development of criteria – including flow criteria, as in the Draft SED.

Finally, in addition to the uses to be protected and the criteria to protect those uses, water quality standards include an antidegradation policy to ensure that the standards are "sufficient to maintain existing beneficial uses of navigable waters, preventing their further degradation."[27] EPA regulations add that "[e]xisting instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected."[28]

In its August 2010 flow criteria report,[29] the Water Board found that "[t]he best available science suggests that current flows are insufficient to protect public trust resources" (page 2), and that "[r]ecent Delta flows are insufficient to support native Delta fishes for today's habitats" (page 5). The Board concluded that:

> In order to preserve the attributes of a natural variable system to which native fish species are adapted, many of the criteria developed by the State Water Board are crafted as percentages of natural or unimpaired flows. These criteria include… 60% of unimpaired San Joaquin River inflow from February through June.

(Page 5.) These conclusions were supported in testimony by state and federal fish and wildlife agencies speaking before the Water Board at the March 20, 2013 public hearing on the Draft SED. By contrast with such science-based flow criteria, the Draft SED recommends a flow objective of (potentially)[30] 35% unimpaired flow.[31] This barely skirts current flows,[32] which the

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[26] 40 CFR § 131.11; *see also* 40 CFR § 131.6.
[27] *PUD No. 1* at 705; CWA Sec. 303(d)(4)(B); 40 CFR § 131.6.
[28] 40 CFR § 131.12.
[29] SWRCB, "Development of Flow Criteria for the Sacramento-San Joaquin Delta Ecosystem" (Aug. 3, 2010) (2010 Flow Report) available at: http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/deltaflow/docs/final_rpt080310.pdf.
[30] In fact, the Draft SED actually does not even commit to a 35% preferred flow alternative. Instead, flows could be 25% of unimpaired flows, there may be no flow changes at all, or flows could decrease. Draft SED, App. K: "Draft Lower San Joaquin River Fish and Wildlife Flow Objectives and Program of Implementation," pp. 4-5.
[31] The vague nature of the narrative standard further facilitates this lack of attention to the flows needed to protect beneficial uses. In particular, the narrative objective calls on the state to "[m]aintain flow conditions from the San Joaquin River Watershed to the Delta at Vernalis, together with other *reasonably controllable* measures in the San Joaquin River Watershed, sufficient to support and maintain" beneficial uses, focusing on flows that "*reasonably* contribute" to maintaining beneficial uses. Draft SED, Appendix K, p. 1. The continued, inappropriate focus on

Draft SED acknowledges have been contributing to the overall decline in salmon and other fish populations.[33] The Water Board attempted to justify this figure its public Fact Sheet on the Draft SED, stating that "[t]he 35 percent unimpaired flow proposal *strikes a balance* between providing water for the protection of fish and other competing uses of water, including agriculture and hydropower generation."[34] As we have just seen, the CWA does not provide for "balancing" beneficial uses; instead, it mandates adoption of criteria that "support the most sensitive use" – in this case, the protection of fish and aquatic life. Rather than the 60% demanded by science, the Draft SED's inattention to CWA requirements has produced criteria far below that needed to protect sensitive beneficial uses, and so runs afoul of the CWA.

As noted by the California Supreme Court, Porter-Cologne "cannot authorize what federal law forbids."[35] Under the federal Constitution's Supremacy Clause (Art. VI), a state law that conflicts with federal law, as the weaker Porter-Cologne provisions clash with CWA requirements, is "without effect."[36] This is true regardless of whether the state prefers the balancing approach associated with the "co-equal goals" foundation. The state simply cannot "balance" water uses in the face of conflicting CWA requirements; it must protect the more sensitive aquatic life uses by providing more water for instream flows. Once again, an approach that recognizes our dependence on a healthy environment and prioritizes action to advance it will more effectively protect waterway health, which in turn will best ensure the long-term reliability of our water supplies.

Accordingly, the Plan must be revised on page 8 to delete language stating that the SWRCB will "balance" competing uses of water, and instead must reference CWA requirements that dictate that the most sensitive beneficial uses must be protected - which will require more flows to be left in waterways, as indicated by the science.

ADDITIONAL ILLUSTRATIONS OF THE RESULTS OF MINIMIZING WATERWAY "NEEDS" IN THE FACE OF HUMAN WATER "DESIRES"

As noted above, the Water Action Plan does recommend important and much-needed steps to bring California water policy in line with the needs of the environment for water, and it

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"reasonably" attainable flows will not support beneficial uses. By contrast, Tennessee's narrative flow standard to protect fish and aquatic life is direct: "Stream or other waterbody flows shall support the fish and aquatic life criteria." Tennessee Rule 1200-04-03-.03 – Criteria for Water Uses, available at: http://tn.gov/sos/rules/1200/1200-04/1200-04-03.20110531.pdf.

[32] *See, e g.*, Draft SED, App. C, p. 2-56 ("February through June flow volume at Vernalis has been reduced to a median of 27% of unimpaired flow… Observed flow from February through June as percentages of unimpaired flows have fallen well below medians of 41%, 21%, and 26% in the Stanislaus, Tuolumne, and Merced Rivers respectively").

[33] Draft SED, p. ES-10 ("scientific information indicates that higher flows of a more natural pattern are needed from the three eastside, salmon-bearing tributaries during the spring (February–June) to protect fish and wildlife beneficial uses (including SJR Basin fall-run Chinook salmon and other important ecosystem processes)").

[34] SWRCB, "Bay Delta Plan Update: Draft San Joaquin River Flow and Southern Delta Salinity Requirements Released for Public Comment," p. 2 (Dec. 31, 2012), available at: http://www.swrcb.ca.gov/waterrights/water_issues/programs/bay_delta/bay_delta_plan/water_quality_control_planning/2012_sed/docs/sjr_factsheet2012.pdf (emphasis added).

[35] *City of Burbank v. State Water Resources Control Bd.*, 35 Cal.4th 613, 626, 108 P.3d 862 (2005).

[36] *Id.*

does acknowledge the boundaries of our water system generally. However, until we recognize that we must subordinate our water desires to the overarching need of the water systems themselves to stay healthy, we will continue to degrade our water supplies, to the detriment of both people and environment. The "co-equal goals" discussion above introduces the flaws with this approach. Two other specific, notable examples on in the Water Action Plan provide additional illustrations of the impacts of minimizing waterway needs in the face of human water desires.

The Plan Must Stretch Further to Develop Meaningful Groundwater Withdrawal Controls

The Water Action Plan correctly notes that groundwater management needs to be improved (page 12); this is particularly true in light of the continued overdraft of groundwater basins around the state,[37] a problem that will only accelerate without further controls. However, rather than joining the other U.S. states and mandating controls on groundwater use, the Plan skirts deftly around the needed statewide mandate, putting the onus instead on local agencies to manage basins without the clear tools and support they need from the Administration to take the hard steps to curtail water overdraft.

Indeed, the language used by the Water Action Plan facilitates the continued status quo of over-drafting to meet human water desires, and minimizes the importance of ensuring healthy aquifers and connected surface waters. It does so, among other ways, by postponing real action until "a basin is *at risk of permanent damage*" by over-drafting (page 6, emphasis added). The difficulty that the Water Action Plan ignores is that by that point (*i.e.*, the cusp of permanent aquifer damage), groundwater pumping and use patterns have already been cemented into place and will be that much harder to change. Action *before* such significant damage has been done to natural systems is necessary to ensure change occurs in a timely manner.

We ask that the Plan be revised to commit to the institution of a mandatory groundwater withdrawal permit system that establishes short- and long-term aquifer health as the basis of the system. Moreover, we urge that the Plan be revised to commit to the development of a streamlined process to halt and prevent the "waste and unreasonable use" of groundwater, as suggested the SWRCB's recently-issued "Groundwater Workplan Concept Paper."[38]

The Plan Must Recognize That Infrastructure That Allows for Even More Water to Be Taken from the Delta and Connected Watersheds Will Fail to Improve Delta Health

The Water Action Plan's failure to reconcile ongoing human water use patterns to the overarching needs and limits of natural systems is also illustrated in the discussion on water storage capacity (page 11). The Plan discusses the difficulties with bringing large surface

[37] *See, e.g.*, J.N. Sbranti, "Groundwater levels falling at alarming rate while lawmakers decide what to do," *Modesto Bee* (Nov. 9, 2013), available at: http://www.modbee.com/2013/11/09/3021442/groundwater-levels-falling-at.html ("[g]roundwater reserves are shrinking by 800 billion gallons per year in the Central Valley").
[38] SWRCB, "Groundwater Workplan Concept Paper," pp. 1, 10 (Oct. 4, 2013), available at: http://www.waterboards.ca.gov/water_issues/programs/groundwater/docs/gw_workplan100713.pdf.

storage projects forward, and notes that the "biggest obstacle" may be finding willing financial partners. The Plan notes that potentially interested financials partners have been holding back in part due to the "uncertainty involved in moving water across the Delta." The Plan then concludes that this uncertainty would be resolved in part by the "new conveyance system proposed in the Bay Delta Conservation Plan," and that partnerships to build additional surface water storage facilities "presumably would follow" such infrastructure.

The Delta serves as the hub of the State's water distribution system. Roughly two-thirds of all Californians and millions of acres of irrigated farmland rely on the Delta for water from the State Water Project and federal Central Valley Project.[39] The impacts on the Delta system from such re-engineering actions have been enormous, and hundreds of millions of dollars have been spent over the last 20 years to try to stem the Delta's degradation. And yet, the problems deepen. The Bay Delta Conservation Plan (BDCP) arose from the threatened extinction of key Delta species, and fundamentally serves as a proposed Habitat Conservation Plan under federal endangered species law and Natural Community Conservation Plan under state endangered species law. That is, the BDCP is intended to "provide for the recovery of endangered and sensitive species and their habitats in the Delta in a way that will also protect and restore water supply reliability."[40]

However, rather than endangered species recovery, the focus of the BDCP has been the development of new conveyance systems, pumping stations and other infrastructure to serve human water desires, providing little in the way of specifics as to how potentially moving more water away from a depleted system will help restore the system or the plummeting species populations that triggered the BDCP process to start. Consistent with the biases in the "co-equal goals" presumption discussed above, the BDCP has become not about saving the Delta, but about ensuring human water supply desires continue to be satisfied – as if water comes from a place other than the environment we need to restore. As the environment has been pointedly demonstrating over the last decade, this is a short-term activity at best.

Unfortunately, the Water Action Plan reinforces the environmentally destructive path taken by the BDCP to prioritize human water desires over environmental needs. This path was seen in the 2008 PPIC Report, and is proposed in the Plan to be extended further to the construction of large surface storage projects. The lip service paid to the "co-equal goals" approach masks the actual import of that philosophical foundation, which is to escalate environmental degradation. Rather than taking action to restore the Delta, as the Plan admits is immediately necessary (page 6), the Plan not only cements the Administration's commitment to the destructive BDCP water conveyance system, but also positions the conveyance system as necessary to construct even more environmentally destructive infrastructure, compounding the damage further.

Disturbingly, these conclusions arise with little to no acknowledgment of the 2008 PPIC Report's finding that *the proposed water conveyance system is actually unnecessary to meet human water needs* – that is, water exports could be halted in order to meet environmental water needs, and human water needs could be satisfied by other means. Specifically, the authors found

[39] http://www.water.ca.gov/swp/delta.cfm.
[40] http://baydeltaconservationplan.com.

that implementation of a "no exports alternative" would involve the development by water users of "alternative, higher-cost sources" and a reduction of "agricultural and urban use particularly for agriculture in the southern Central Valley."[41] In other words, if California made the investments outlined in the 2008 PPIC Report, we could end exports, markedly improve Delta health, and create local water resilience and improve supply certainty through source diversification. No serious consideration was given to this finding in the Water Action Plan, however, with predictable results for the environment's water needs. We ask that this gap be filled with a serious discussion in the Plan of the contours, benefits and costs associated with aggressive reduction of exports and retention of the saved water in waterways as needed for their well-being.

THE PLAN SHOULD INCLUDE COMMITMENTS TO ADDITIONAL PROGRAMS NECESSARY TO ACHIEVE LONG-TERM SUSTAINABLE WATER USE

The Plan Should Commit to the Creation of a Streamlined Process to Halt and Prevent the "Waste and Unreasonable Use" of Surface Water and Groundwater

The California Constitution prohibits the "waste or unreasonable use or unreasonable method of use of water"[42] to protect the many beneficial uses of water in the state, including but not limited to the preservation and enhancement of fish populations.[43] Despite this clear, broad mandate, the state has relatively rarely exercised this authority to prevent the escalating over-draft of groundwater basins or the drawing-down of surface water bodies.[44] The definition of "unreasonable" necessarily shifts as flows diminish, requiring us to re-examine uses that were formerly deemed acceptable. However, addressing even the most egregious cases of misuse is costly and time-consuming under the existing regulatory system, which essentially requires one-by-one examination of allegations of water waste.[45] The Delta Watermaster began a discussion in early 2011 around the potential for a more streamlined waste and unreasonable use program that would facilitate increased agricultural water use efficiency.[46] This initiative, however, was shut down quickly, and little public action has occurred since then to create a streamlined effort

[41] 2008 PPIC Report, p. 108.
[42] California Constitution § Article X Section 2; *see also* Water Code § 275.
[43] Water Code § 1257.
[44] This concern, unfortunately, is not limited to the Delta ecosystem. As just one example, sections of the Scott River are completely dewatered during summer months, while other sections are severely flow-impaired. Adjudicated water rights alone are sufficient to allow complete dewatering of the Scott River during the summer and early fall. In addition, a shift from surface diversions, which are naturally self-limiting, to groundwater wells has made worse the over-appropriation of water in the watershed. National Research Council, "Endangered and Threatened Fishes in the Klamath River Basin – Causes of Decline and Strategies for Recovery," The National Academies Press, Washington, D.C. (2004); S.S. Papadopulos & Associates Inc., "Groundwater Conditions in Scott Valley, California," Report prepared for the Karuk Tribe, Happy Camp, CA (2012).
[45] 23 CCR §§ 780, 855 *et seq*., and 4000 *et seq*.
[46] Craig Wilson, Delta Watermaster, "The Reasonable Use Doctrine and Agricultural Water Use Efficiency" (Jan. 2011), available at: http://www.swrcb.ca.gov/board_info/agendas/2011/jan/011911_12_reasonableusedoctrine_v010611.pdf (Delta Watermaster Report).

to ferret out waste and unreasonable use statewide. The Water Action Plan also makes no mention of this critical legal authority. The gap must be addressed.

We urge the Administration to prioritize the implementation of a clear, streamlined process for implementing the Constitution and Water Code's "waste and unreasonable use" provisions for both surface water and groundwater. This action is essential if we are to become a sustainable water society, and to ensure that we create a culture of adaptive water management that forces us to regularly re-examine our water *needs* in light of threatened supplies.

The Plan Should Commit to the Development of an Instream Water Rights Law and Program

Also notably missing in the Plan is an analysis of the need for legal and programmatic structures that address the inherent imbalance between water rights for human use of water, and no water rights for the environment's use of water. We must recognize the inherent rights of waterways to flow through the development of an effective instream water rights program, which will allow waterways to legally be "at the table" when their flow needs are being assessed.

Currently, our water rights allocation system places the environment's access to water on a second tier status, below all human uses. We currently fail to recognize in law the waterway's inherent right to keep necessary water in its system. This approach rests on an outmoded, injurious perception of humans' ability to predict and control the natural world, and the perceived right to use the natural world to feed human desires. The failure of this approach to grasp the full scope of the relationships that exist among humans and the environment means that it will fail to allow and constrain human behavior as needed to promote healthy relationships. In other words, until we address this built-in, legal water rights imbalance, we will never be able to achieve even a "co-equal goals" vision, let alone healthy waterways and fish populations.

If water rights are to be the legal system by which water is allocated, then the law must reflect the science and ethics of our integration with our environment: legal water rights for waterways must be developed, allocated, and enforced to support water needs for healthy aquatic ecosystems and a healthy California. Our legal system currently addresses ecosystem water needs only indirectly, through such methods as conditions in permits, mandates (currently unimplemented) to prevent "waste and unreasonable use" (when implemented), Water Code Section 1707 water transfers, the public trust doctrine, and application of the Endangered Species Act (ESA). None of these otherwise important tools are actual water *rights*, however, at a level equivalent to currently-allocated water rights for human uses. The result to date has been that ecosystem water needs are consistently relegated to a tangential role in state water planning, until the ecosystems and/or their non-human inhabitants are at the brink of collapse. That is when the ESA hammer falls – abruptly, with little foresight, controversially, and often too late.

California needs a legal system that allows the state to plan effectively for the water needs for *both* Californians and California's ecosystems. The dangerously well-trod path of "use, overuse, environmental decline, then hasty and unplanned reaction" can begin to be broken by granting ecosystems the right to be at the planning table from the beginning, at a level *legally* "co-equal" to human water uses – rather than at the end when the damage is done. This

necessarily must include all water sources, including aquifers, given their connections in the state water system.

In addition to identifying in law the rights of waterways to the flows that they need, the state must establish processes for pairing these ecosystem water rights with identified water sources. Strategies to "harvest" flows as needed for ecosystem water rights include but are not limited to the following:

- "Waste and unreasonable use" determinations made consistent with Water Code Section 275 and California Constitution Article X, Sec. 2, as discussed above;
- Efforts to help convince water rights holders to give up rights voluntarily via potential charitable giving process (which would require a clear, long-term accounting system);
- Review of unexercised rights and reapplication to ecosystem needs as appropriate;
- Formal water adjudications;
- Work with the federal government to review the allocation of federal water rights, and adjustment as needed to reflect the rights of waterways to flow;
- Development of a process to assign rights associated with "new" water from sources such as ecosystem-focused conservation and water recycling; and
- Increases in fees on diversions to encourage voluntary release of unneeded rights.

Given the significant over-allocation of water rights in the state on paper, and the unknown amount of water diverted under riparian and pre-1914 rights, this task may be complex and take some time. It is not, however, insurmountable in light of the numerous existing legal tools that the state could use if it chooses to plan wisely, rather than continue to rely on the courts as the effective arbiters of water governance in the state.

As water rights are freed up, they should be reassigned to waterways in a planned effort that considers the relative needs of waterways and fish populations. This will necessarily be an ongoing, evolutionary process in light of the fact that both uses and the waterways themselves will change over time (due to climate change, for example).

Other key elements to address in developing a rights-based system for protecting the health of waterways and fish include enforcement and accounting. With respect to enforcement, ecosystem water rights, while they would be held by the waterway, must be managed on their behalf by human agents. Independent legal guardians or trusts can be established for this task, and given a clear fiduciary responsibility to protect and enforce the identified water rights fully. While these entities should be accountable to the public, they should not be a government agency, as they must have full and primary responsibility for protecting the waterways to which they are assigned. Guardians/trusts necessarily should be appointed and be required to coordinate consistent with a statewide system focus, due to impacts of connected waterways and water systems.

With respect to accounting, the state would need to ensure that flows put back into a waterway are being maintained in the waterway and not simply removed downstream. This is not a need limited to a "water rights for rivers" approach, but is one that is also applicable to the Section 1707 transfer process and other, existing approaches to restore waterway health. A clear

system for tracking and maintaining assigned waterway flows in the medium- and long-term should be established to ensure success and provide accountability and transparency for the public.

Necessarily, the state should also develop a process for funding program costs, including guardian/trust costs, accounting and oversight, research and monitoring, and other program elements. A reliable source of funding is essential; oversight funding cannot simply be delegated to intermittent grants and allocations. Fees on water diversions, for example, should at a minimum be tapped as a regular funding stream, with less-regular sources (such as federal or other grants) identified for short-term/pilot initiatives.

Accordingly, we urge the state to include in the Water Action Plan a commitment to developing and implementing the legal and programmatic structures needed to recognize the inherent rights of waterways to flow, and for waterway-dependent fish and wildlife to thrive.

* * *

The Water Action Plan asserts that the state's water system currently cannot meet "both ecological and human needs." However, this starting point – like the "co-equal goals" approach – is inherently flawed, in that it fails to recognize that we are continuing to pit ecological *needs* against human *desires*. The environment – particularly threatened and endangered species and flow-depleted waterways – "need" water for basic survival. The Plan, however, regularly balances such acute needs against current human uses, without examining whether human uses are "needs" or "desires" (which, perhaps, an adequate "waste and unreasonable use" program would be able to do). Accordingly, from the start the Plan skews the proposed actions toward more water for humans and less for the environment, continuing us on a path of unreliability, lack of resilience and missed restoration opportunities.

We have created lifestyles and patterns of human water use that are simply unsustainable. However, the Plan fails to prioritize (or in many cases even identify) essential changes necessary to ensure that we have the water we need, rather than the water we think we must have. There is no way around the fact that Californians must adjust current lifestyles (from agricultural use to energy development, landscaping, sanitation and many other practices) to match the water sources and climate that exist. Yet the Plan fails to tackle the critical distinction of "ecological needs versus human desires" or identify specific ways to address this key challenge, even when potentially useful strategies have already been analyzed and recommended elsewhere. For example, the Plan fails to call for mandatory, statewide groundwater controls used by other states, and ignores the 2011 Delta Watermaster Report on applying the "reasonable use doctrine" to achieve agricultural water use efficiency. The Plan also ignores the potential benefits of instituting a program of instream water rights (as other states have initiated) that would treat water for the environment in a manner *legally* co-equal to water for humans.

In short, real action is missing. Instead, the Plan in large part reinforces the failed actions of the past, rather than sets us on course that respects the water "needs" of the environment and adjusts our human water "desires" as required to meet those needs.

Until we let go of the myth that we can have the water we desire and the environment will meet its needs because we said it could (*i.e.*, through the "co-equal goals" credo), water "reliability" and "resilience" will continue to elude us, and the environment will most certainly remain well away from a "restored" position. We would welcome instead a Water Action Plan that comprehensively faces the problems before us and proposes meaningful strategies that we initiate now, while we have time to make adjustments as needed – rather than when the well runs dry. Thank you for your attention to these comments.

Best regards,

Linda Sheehan
Executive Director